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No. 00-1764

IN THE
Supreme Court of the United States

INTERCITY MAINTENANCE CO.,
Petitioner,

v.

LOCAL 254, SERVICE EMPLOYEES INTERNATIONAL UNION;
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO;
VICTOR LIMA; DONALD COLEMAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT LOCAL 254, SERVICE EMPLOYEES INTERNATIONAL UNION

DAVID P. DEAN
Counsel of Record
JAMES & HOFFMAN
1101 17th St., N.W., Suite 510
Washington, D.C. 20036-4704
(202) 496-0500

Attorney for Respondent SEIU Local 254

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QUESTION PRESENTED

The Petition for Writ of Certiorari incorrectly states the questions presented for review. Respondent Local 254 submits that only the following question is presented:

> Whether the First Circuit Court of Appeals correctly held under *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 58 n.2, 64-65 (1966) that a defamation plaintiff in a labor dispute may not rely on presumed damages under state law, but rather must prove actual harm by showing the severity of the harm resulting from a libel in order to recover either compensatory or punitive damages.

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STATEMENT OF THE CASE

The Petition arises from a lawsuit by Intercity Maintenance Corporation (Intercity), a nonunion janitorial service, against the Service Employees International Union (SEIU), its local affiliate (Local 254), and two Local 254 employees, Donald Coleman and Victor Lima, for unlawful secondary activity in violation of § 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187, and state law torts including two defamation claims. The district court granted summary judgment to the SEIU and Lima on all counts and to Coleman on all but the defamation claims. At the close of plaintiff's evidence at trial, the court granted judgment as a matter of law to Local 254 and

Coleman on the remaining defamation and LMRA claims. As to the defamation claims, the district court held that Intercity had proved malicious statements about Intercity but that "it would be sheer speculation for the jury to conclude that the plaintiff suffered some type of loss as a result of these libelous statements." Pet. App. 20-21.

The First Circuit Court of Appeals affirmed the summary judgment ruling and the FED. R. CIV. P. 50 ruling on the defamation claims, but remanded the LMRA claim for retrial. As to the defamation claims, the court held that *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 58 n.2, 64-65 (1966) required proof of actual harm, and that Intercity had failed, as a matter of law, to present sufficient evidence of harm:

> In explicitly requiring proof of harm, *Linn* preempts not only non-malicious libels, but also reliance on the common law presumption of damages in those jurisdictions where libel is actionable per se. [] Therefore, plaintiffs who endure even malicious libels during a labor dispute must present evidence of harm from defamation in order to recover, notwithstanding the law of states such as Rhode Island in which damages would otherwise be presumed. []
>
> Under *Linn*, Intercity could not rest on an unsubstantiated allegation of injury to its reputation. Having correctly concluded that *Linn* preempted Intercity from relying on the common law presumption of damages, the district court held that the evidence of actual loss due to reputational harm and consequent lost profits was insufficient as a matter of law. We agree that Intercity offered no more than a scintilla of evidence to prove losses stemming from diminished reputation.

Pet. App. 14-15 (citations omitted). In addition, the appeals court held that insofar as Intercity attempted to prove harm by showing that it later failed to win certain janitorial contracts, Intercity presented "no evidence" to show that the loss of contracts resulted from defendants' libels. Pet. App. 15.

Intercity has petitioned this Court for a writ of *certiorari*, claiming that the First Circuit Court of Appeals misconstrued *Linn*'s requirement that Intercity prove actual harm resulting from defamation in order to recover. The Petition argues variously that Intercity should have been able to rely on the presumed damages flowing from statements that are libelous *per se* under Rhode Island law to meet the actual harm requirement of *Linn* (Pet. Br. 6-10); that the First Circuit improperly required proof of special pecuniary losses to meet *Linn*'s harm requirement (Pet. Br. 10-15); and that the appeals court improperly applied *Linn*'s harm requirement to preclude Intercity receiving punitive damages (Pet. Br. 15-16).

ARGUMENT

This case involves neither a conflict with relevant precedents of this Court nor a conflict among the courts of appeal. Rather, the Petition reflects an unwarrantable invitation to overrule this Court's long settled, well reasoned precedent concerning federal labor law preemption of defamation claims by parties to a labor dispute. The First Circuit Court of Appeals properly applied this Court's controlling holding in *Linn* to find state law defamation claims preempted, including claims for punitive damages, because Intercity failed to prove actual harm of any kind.

1. The First Circuit Court of Appeals properly applied *Linn v. United Plant Guard Workers, Local 114* to foreclose Intercity's reliance on presumed damages under Rhode Island law.

In *Linn*, this Court squarely addressed the question of whether the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, preempted a libel claim under state law by an official of an NLRA employer seeking damages for defamatory statements published by a union and its officers during an organizing campaign. 383 U.S. at 55. The Court faced this issue against the background of its earlier holding that the NLRA broadly preempted state law regulation of conduct that the federal labor

statute "protects, prohibits, or arguably protects or prohibits." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 241-44, 246 (1959).

The defamation claim in *Linn* arose from leaflets distributed during a representation campaign charging that a management official had "robbed" and lied to employees. 383 U.S. at 56. The complaint alleged no "actual or special damage," but sought a $1,000,000 award on the basis that the statements were libelous *per se*, an allegation this Court understood to indicate that the plaintiff was relying on presumed damages. *Id.* at 56, 58 n.2. In deciding the preemption issue, this Court clearly recognized that Congress through the NLRA intended "to encourage free debate on issues dividing labor and management" and that courts must consider such disputes "'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.'" *Id.* at 62 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Organizing campaigns, in particular, this Court noted "are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." *Id.* at 58.

In this light, the *Linn* Court was particularly troubled that "the law in many States presumes damages from the publication of certain statements characterized as actionable *per se*," *id.*, a category of libel that "developed without specific reference to labor controversies," *id.* at 65. Consequently, this Court found that state jurisdiction should be limited to "redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false,"[1] *but in addition*, this Court

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[1] The Court adopted this first element of the standard for preemption "by analogy" with the constitutional malice standard announced in *New York Times Co. v. Sullivan*. *Id.* at 65. The Petition emphasizes that such malicious statements enjoy no Constitutional protection under the First Amendment.

expressly found preempted all claims that did not include proof of actual, as opposed to presumed, damages:

> As we have pointed out, certain language characteristic of labor disputes may be held actionable *per se* in some state courts. These categories of libel have developed without specific reference to labor controversies. However, even in those jurisdictions, *the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm.* This is a salutary principle. We therefore hold that *a complainant may not recover except upon proof of such harm*, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law. The fact that courts are generally not in close contact with the pressure of labor disputes makes it especially necessary that this rule be followed. . . . . Likewise, the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages.

Id. at 61, 65-66 (emphasis supplied).

Because the *Linn* plaintiff had relied solely on presumed damages in his pleading, the Court directed that he should be given leave to amend his complaint to allege actual, compensable harm:

> Since the complaint here does not make the specific allegations that we find necessary in such actions, leave should be given Linn on remand to amend his complaint, if he so desires, to meet these requirements. In the event of a new trial he, of course, bears the burden of proof of such allegations.

Id. at 66.

Pet. Br. 6-8. But since *Linn* is based on federal, statutory preemption, not First Amendment protections, Petitioner's argument is here wholly misdirected.

The First Circuit Court of Appeals properly applied *Linn*'s actual harm requirement to Intercity's claim in this case. Pet. App. 14 -16. Like the plaintiff in *Linn*, Intercity seeks to rely on presumed damages to general reputation flowing from libel *per se* under state law. Although the Petition is less than clear on the point, this is the only harm on which Intercity *could* rely. Both the district court and the court of appeals found as a matter of law that Intercity had failed to present sufficient evidence of harm to general reputation to go to a jury. *Id.*, Pet. App. 20-21. In addition, both courts found that Intercity had failed to prove a causal nexus between any libels and Intercity's subsequent failure to win certain janitorial contracts. *Id.* Intercity does not seriously challenge either of these findings. Nor would any such challenge to a factual finding or alleged misapplication of law warrant this Court's review. SUP. CT. R. 10.

The courts of appeal have not split in interpreting *Linn*. In the three and a half decades since *Linn* was decided, no court of appeal has questioned or misapplied *Linn*'s harm holding. Rather, the Eleventh Circuit accurately summarized *Linn* on exactly the presumed harm point at issue here:

> The [*Linn*] court also held that even where under state law certain language may be actionable as libel *per se*, thus automatically entitling the plaintiff to damages, where federal labor policy is implicated, the complainant may not recover except upon proof of actual harm.

Pantex Towing Corp. v. Glidewell, 763 F.2d. 1241, 1248 n.7 (11th Cir. 1985); *see also Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1210-1211 (11th Cir. 1999) ("Florida law recognizes certain types of libels as 'libel per se,' meaning that injury is presumed and the plaintiff need not present evidence on the issue. [] Under federal law, however, a libel action arising out of a labor dispute requires proof of injury, regardless of state libel law" (cites omitted)).

Against this background, Petitioner attempts to raise an issue about the applicability of *Linn*'s harm requirement by reverting to assorted district and state court opinions generally

characterizing Linn's preemption holdings. Pet. Br. 8. This attempt utterly fails, however, because those courts either expressly recognized *Linn*'s actual harm requirement, or were decided wholly on other grounds. *See Box Tree South, Ltd. v. Bitterman*, 873 F. Supp. 833, 841 (S.D.N.Y. 1995)(recognizing that that this Court held that the NLRA "does preempt a state's defamation law to the extent that state law would otherwise provide a remedy in such cases when malice *and actual injury* are not proven"(emphasis supplied)); *Metheney v. Monarch Rubber Co.*, 43 F. Supp. 2d. 588, 592 (S.D. W. Va. 1999) ("[T]he Supreme Court limited the state defamation action to 'those instances in which the complainant can show that the defamatory statements were circulated with malice *and caused him damage*"(emphasis supplied)); *Briggs & Stratton Corp. v. National Catholic Reporter Publishing Co.*, 978 F. Supp. 1195, 1199 (E.D. Wis. 1997) (denying motion to dismiss state defamation claim because Linn did not "extend protection to third parties unrelated to a purported labor dispute"). Petitioner's appeal to state court authority is similarly unavailing. *See Tosti v. Ayik*, 476 N.E.2d 928, 938 (Mass. 1984)(holding that defamation plaintiff in a labor dispute "is entitled only to fair compensation for his *actual* damages . . . ." (emphasis supplied)).

2. The First Circuit did not require Intercity to prove special pecuniary damages.

The Petition argues that the First Circuit erroneously "required the targeted victim of malicious libels to prove special pecuniary losses . . . ." Pet. Br. 10-15. (initial caps adjusted). That argument misreads the appeal court's opinion. The appeal court specifically noted that the proof of harm required by *Linn* could include "general injury to reputation, consequent mental suffering, alienation of associates," *or* "specific items of pecuniary loss." Pet. App. 14 (quoting *Linn*). The court also noted, however, that "Intercity offered no more than a scintilla of evidence to prove losses stemming from diminished

reputation." Pet. App. 15. The appeals court therefore agreed with the district court that the quantum of Intercity's proof of harm aside from "specific items of pecuniary loss" was insufficient as a matter of law.

Rather, Intercity relied on evidence of damages apart from reputation to meet *Linn*'s actual harm requirement: the loss of two janitorial contracts. The losses of these contracts were "specific items of pecuniary loss" under *Linn*, and therefore among the kinds of losses that would meet *Linn*'s harm requirement. Intercity presented "no evidence," however, to prove those losses were caused by any libels. Pet. App. 15.

Thus, the First Circuit Court of Appeals did not require Intercity to prove special or pecuniary damages. Under the court's decision, general injury to reputation would have sufficed to meet *Linn*'s harm requirement. Intercity simply failed to produce sufficient evidence of any such harm. Once Intercity undertook to prove specific items of pecuniary loss, the burden was clearly on it also to prove causation for these losses. Intercity having failed to do so, the district court and appeals court properly found Intercity's claim preempted under *Linn*.

3. The First Circuit properly denied Intercity punitive damages because Intercity failed to prove any compensable harm.

The Petition argues erroneously that presumed damages to reputation under state law should be sufficient to meet the "compensable harm" requirement under *Linn* that is a prerequisite to punitive damages. Pet. Br. 15-17. First, that result would be directly contrary to *Linn*. 383 U.S. at 65-66 (equating actual harm and compensable harm). Second, creating such an exception to *Linn*'s basic holding would have the anomalous consequence that a claim preempted by federal law for lack of any actual harm could yet proceed to a jury for punitive damages under state law. Self evidently, such a result would eviscerate *Linn* and fundamentally undercut this Court's

well reasoned preemption jurisprudence under *Garmon*. Justice Black, dissenting to the narrow exception which *Linn* created to *Garmon* preemption, captured the danger of such a result with typical eloquence:

> The object of the National Labor Relations Act was to bring about agreements by collective bargaining, not to add fuel to the fire by encouraging libel suits with their inevitable irritations and dispute-prolonging tendencies. Yet it is difficult to conceive of an element more certain to create irritations guaranteed to prevent fruitful collective bargaining discussions than the threat or presence of a large monetary judgment gained in a libel suit generating anger and a desire for vengeance on the part of one or the other of the bargaining parties. I think, therefore, that libel suits are not only "arguably" but inevitably in conflict with the basic purpose of the Act to settle disputes peaceably—not to aggravate them, but to end them.

Id. at 68 (Black, J., dissenting).

To best implement the NLRA and *Linn*, this Court should now help the parties end this libel dispute by denying Intercity's petition for a writ of *certiorari*.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

DAVID P. DEAN
Counsel of Record
JAMES & HOFFMAN
1101 17th St., N.W., Suite 510
Washington, D.C. 20036-4704
(202) 496-0500

Attorney for Respondent
SEIU Local 254